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8th Amendment Freedom from Cruel and Unusual Punishment: Lethal Injection Drugs

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8TH AMENDMENT FREEDOM FROM CRUEL AND UNUSUAL
PUNISHMENT: LETHAL INJECTION DRUGS

CASEY ELLIOTT¹

I. INTRODUCTION	27
II. THE CURRENT LANDSCAPE OF LETHAL INJECTION PROCEDURES...	29
III. OBTAINING LETHAL INJECTION DRUGS	33
A. BRAND-NAME PHARMACEUTICALS	33
B. COMPOUNDING PHARMACIES	35
IV. PHYSICAL EFFECTS OF CURRENT LETHAL INJECTION DRUGS	36
A. EFFECTS OF ONE AND THREE-DRUG PROTOCOLS.....	36
B. PROBLEMS WITH THE PROTOCOLS.....	37
C. THE ISSUE OF DEPARTMENT OF CORRECTIONS ADMINISTERING DRUGS	39
V. LIABILITY FOR DOCTORS PARTICIPATING IN LETHAL INJECTION	40
A. DOCTORS PARTICIPATING IN THE ACTUAL EXECUTION	40
B. DOCTORS PRESCRIBING LETHAL DOSES OF DRUGS	42
VI. SOLUTIONS TO DEALING WITH LETHAL INJECTION PROTOCOLS...	43
A. TRANSPARENCY	43
B. CAPITALISM TO PROVIDE LETHAL INJECTION DRUGS	44
C. DISCONTINUE LETHAL INJECTION	45

I. INTRODUCTION

The Eighth Amendment of the United States Constitution guarantees that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”² Through the Fourteenth Amendment this provision applies to all states. Article I, Section 16 of the Tennessee Constitution guarantees the same: “That excessive bail shall not be required, nor excessive

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² U.S. CONST. amend. VIII.

finer imposed, nor cruel and unusual punishment inflicted.”³ Moreover, Article I, Section 32 says that the “erection of safe prisons, the inspection of prisons, and the humane treatment of prisoners, shall be provided for.”⁴ Thirty-six states still use the death penalty as a valid form of punishment, and all thirty-six states and the federal government use lethal injection as the primary manner of execution.⁵ There is no doubt that the death penalty has been, and will continue to be, a constitutionally valid form of punishment.⁶ However, the issue that gives the states trouble is “the means of carrying it out.”⁷

The Supreme Court has held twice that lethal injection is a constitutional method of execution.⁸ There has been change and reform in lethal injection protocols since the Supreme Court’s decision in *Baze v. Rees*. As states look to acquire execution drugs, anti-death penalty groups and European drug manufacturers have made it almost impossible to obtain sufficient drugs.

This paper will address and analyze the problem of whether the risk of harm to an inmate is sufficiently present to offend the Eighth amendment’s ban on cruel and unusual punishment due to the current protocols on execution drugs. Section II will discuss the overview of current lethal injection procedures. In Section III, I will examine where states are getting lethal injection drugs. Section IV will explore the constitutionality of lethal injection drugs by looking at the actual physical effects of the drugs. Section V will discuss the issue of who is prescribing lethal injection drugs. Finally, Section VI will propose solutions to deal with the problem of lethal injection. In order to ensure adherence to the Eighth amendment and protect the rights of inmates, states must be held accountable for their role in lethal injection executions.

³ TENN. CONST. art. I, § 16.

⁴ TENN. CONST. art. I, § 32.

⁵ *Baze v. Rees*, 553 U.S. 35 (2008).

⁶ *Gregg v. Georgia*, 428 U.S. 153 (1976).

⁷ *Baze*, 553 U.S. at 47.

⁸ *See Baze*, 553 U.S. at 35; *Glossip v. Gross*, 135 S. Ct. 2726 (2015).

II. THE CURRENT LANDSCAPE OF LETHAL INJECTION PROCEDURES

Before *Baze v. Rees* there had only been very early Supreme Court cases reviewing the constitutionality of various methods of execution, and the Court had never invalidated a state's chosen procedure because it was cruel and unusual punishment.⁹ Courts do agree that if a method of execution causes excruciating pain or the objectively intolerable risk of such pain, it violates the Eighth Amendment.¹⁰ Further, to invalidate a chosen procedure, there must be a feasible alternative readily available that significantly reduces a substantial risk of pain.¹¹ After *Baze* there is still some question about the legal standard for Eighth Amendment claims against lethal injection, however, parties and courts mostly agree that lethal injection procedures must not create a substantial risk of unnecessary harm.¹²

Until 2009, states that employed the death penalty used a three-drug protocol consisting of lethal doses of an anesthetic (either sodium thiopental or pentobarbital), pancurium bromide (brand-name Pavulon), and potassium chloride.¹³ This type of three-drug protocol was deemed constitutional in *Baze* because the Petitioners could not show that the risk of pain was high enough to violate the ban on cruel and unusual punishment. The Supreme Court held that if there were a feasible, readily-implemented alternative method of execution that in fact significantly reduced a substantial risk of severe pain, a state's refusal to adopt that alternative method – without a legitimate penological interest for adhering to its current method – would be cruel and unusual under the Eighth Amendment.¹⁴ During *Baze* arguments, the Petitioners contended that adopting a one-drug protocol could eliminate the risks they identified in the lethal injection protocol.¹⁵ At the time, the Court held that the alternative had not been tested by any other state, and “the comparative efficacy

⁹ See generally *Wilkerson v. Utah*, 99 U.S. 130 (1879).

¹⁰ *Baze*, 553 U.S. at 61.

¹¹ *Id.*

¹² Eric Berger, *Lethal Injection and the Problem of Constitutional Remedies*, 27 YALE L. & POL'Y REV. 259 (2009).

¹³ *State by State Lethal Injection*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/state-lethal-injection> (last visited Dec. 10, 2015).

¹⁴ *Baze*, 553 U.S. at 57-61.

¹⁵ *Id.* at 50.

of a one-drug method of execution is not so well established that Kentucky's failure to adopt it constitutes a violation of the Eighth Amendment.”¹⁶ Post *Baze*, states have had to alter their lethal injection protocols due to drug shortages.

In the wake of *Baze*, some states have modified their lethal injection methods to use a one-drug protocol like the one suggested by the Petitioners in *Baze*. Currently, eight states have used a one-drug protocol, and six states have announced intentions to use one drug, but have not carried out such an execution.¹⁷ Because sodium thiopental is impossible to obtain for lethal injections, states are choosing other drugs to carry out lethal executions. Fourteen states have used pentobarbital in lethal injections, and five others plan to use it in the future. Some states have used the drug Midazolam, instead of sodium thiopental, in both two and three-drug protocols. Since *Baze* held a three-drug protocol constitutional, death row inmates now must look at other ways to challenge the constitutionality of the death penalty, such as attacking the actual drug used. In the recent case, *Glossip v. Gross*, the Petitioners challenged the constitutionality of using the drug Midazolam in Oklahoma executions.¹⁸

In *Glossip*, the death-row inmates filed a Section 1983 action against the State of Oklahoma, claiming that the use of Midazolam violated the Eighth amendment.¹⁹ The Petitioners argued that the current protocol dose of Midazolam would not render them unable to feel the pain associated with the administration of the second and third drug, and thereby violated the prohibition of cruel and unusual punishment. The case came after Oklahoma's execution of Clayton Lockett. During the Lockett execution, after multiple failed attempts to find a vein, Lockett's IV was finally placed in his femoral artery – not a first choice of IV placement.²⁰ According to the protocol, 100 milligrams of Midazolam were required to sedate the inmate before the other two drugs were administered.²¹ After the Midazolam had been administered, and the second and third drugs were being administered, Lockett began to move and speak. The doctor observed that the IV fluid had not entered the bloodstream, but the surrounding

¹⁶ *Id.* at 57.

¹⁷ *State by State*, *supra* note 12.

¹⁸ *Glossip v. Gross*, 135 S. Ct. 2726 (2015).

¹⁹ *Id.*

²⁰ *Id.* at 2734.

²¹ *Id.*

tissue, putting Lockett in severe pain.²² After an investigation, Oklahoma made changes to their protocol, which now allows for the Oklahoma Department of Corrections to choose between four drug combinations. The protocol chosen for the petitioners in *Glossip* required a 500-milligram dose of Midazolam as the first drug in a three-drug execution.

Glossip explains that for a petitioner to succeed in an Eighth Amendment method-of-execution claim, they must prove that any risk of harm is substantial when compared to a known and available alternative method of execution.²³ The Court affirmed the *Baze* decision and applied the *Baze* reasoning to the facts of *Glossip*. The Petitioners tried to claim that the state could use sodium thiopental in the three-drug protocol, or pentobarbital. However, the Court held that they did not show an alternative method because factually other methods did not actually exist.

In the factual record it was clear that Oklahoma was unable to acquire other drugs, despite a good-faith effort to do so.²⁴ The Court also held that the Petitioners did not satisfy their burden to show that the use of the drug Midazolam would cause a substantial risk of pain. Testimony from both parties concluded that the protocol dose of Midazolam would render an inmate insensitive to further pain.²⁵ Further, the Majority held that Oklahoma had even gone so far as to implement safeguards that the dissent in *Baze* had complained were absent from Kentucky's protocol.²⁶

Following *Baze* and *Glossip*, the precedent for holding lethal injection constitutional has been fairly well established. Applying the precedent, inmates bringing method-of-execution claims must still prove that a reasonable alternative clearly alleviates the risk of substantial pain. However, the majority of states have substantially similar execution protocols as Kentucky and Oklahoma. *Baze* warns against turning courts into "boards of inquiry charged with determining best practices for executions."²⁷ The Court says it would be foolish to embroil courts in scientific controversies beyond their expertise and intrude on the role of legislatures in writing protocols.²⁸

²² *Id.*

²³ *Id.* at 2737.

²⁴ *Id.* at 2738.

²⁵ *Id.* at 2740.

²⁶ *Id.* at 2742.

²⁷ *Baze*, 553 U.S. at 50.

²⁸ *Id.*

Therefore, the alternative method must clearly meet the burden of significantly reducing a substantial risk of severe pain.²⁹ Tennessee has adopted a new one-drug protocol using a lethal dose of pentobarbital. Although the Supreme Court set a high burden for inmates to establish an Eighth Amendment claim, there seems to be no end to litigation concerning lethal injection.

Death-row inmates in Tennessee recently brought a method-of-execution claim against the state, alleging that the current protocol using compounded pentobarbital violates the Eighth Amendment because it creates the risk of severe pain and lingering death.³⁰ In August of 2015, the Chancery Court in Nashville, Tennessee heard the inmates' case. The Chancellor applied *Baze* as the test for an Eighth Amendment claim requiring a petitioner to show that the protocol poses a substantial risk of serious harm, and then to propose an alternate method of execution or demonstrate that no lethal injection protocol can significantly reduce the substantial risk of severe pain.³¹ The Court held that compounded pentobarbital does not pose a significant risk of serious harm that qualifies as cruel and unusual, because the drug will likely cause death with minimal pain and quick loss of consciousness.³² Following the second prong of *Baze*, the Court held that executions held in a clinical or hospital setting are not a reasonable, feasible alternative to the current protocol. Further, the Petitioners did not prove that an alternative lethal injection protocol could significantly reduce the substantial risk of severe pain, because they were not able to show that inmates suffered pain in other one-drug pentobarbital executions.³³

As of 2015, no lethal injection protocol has been constitutionally invalidated; however, this does not mean that there is not a possibility that some protocols may be unconstitutional. In her article, *How Medicine has Dismantled the Death Penalty*, Deborah Denno expounds that, historically, constitutional challenges to execution methods promoted states to choose a new and more humane execution method.³⁴ When execution methods were

²⁹ *Id.*

³⁰ Transcript of Proceedings on 08/26/2015 at 8, *West v. Schofield* (No. 13-1627-I).

³¹ *Id.* at 59.

³² *Id.*

³³ *Id.* at 78.

³⁴ Deborah Denno, *The Lethal Injection Quandary: How Medicine has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49, 117 (2007).

challenged, there was an effort by states to pay respect to the evolving standards of decency and find a better method. Alternatives to lethal injection have not produced the same result, but have only led to increased strategies to attack the method. Denno presumes that these challenges would encourage states to make substantial changes to their protocols. Instead, states have disjointedly reviewed their protocols, with almost non-existent comment periods, which indicate a need for a more comprehensive effort to address the problems associated with lethal injections.³⁵

III. OBTAINING LETHAL INJECTION DRUGS

A. BRAND-NAME PHARMACEUTICALS

In 1977, when Oklahoma was preparing to execute prisoners following the moratorium on executions, the state sought assistance from the Oklahoma Chief Medical Examiner to provide a more humane alternative.³⁶ Dr. Jay Chapman proposed a three-drug cocktail that was quickly adopted by the thirty-seven lethal injection states. Dr. Chapman's protocol was simple: an anesthetic to render inmate unconscious, a paralytic to stop the breathing, and a drug to stop the heart.³⁷ The clarity of the protocol was inhibited by the lack of research of the drugs, dosages and the specific practice. Five years after Dr. Chapman's proposal, the Texas Department of Corrections created a protocol specifying the drugs and dosages to be used for their first legal injection execution.³⁸ This was the case in all lethal injection states. By 2002, thirty-seven states had "simply mirrored Oklahoma's vague legislative approach and drug combination choices without conducting any independent studies or research."³⁹

³⁵ *Id.*

³⁶ Elizabeth Cohen, *Lethal Injection Creator: Maybe its Time to Change Formula*, CNN (Apr. 30, 2007), <http://www.cnn.com/2007/HEALTH/04/30/lethal.injection/>.

³⁷ *Id.*

³⁸ Robbie Byrd, *Informal Talks Opened the Door to Lethal Injection*, THE HUNSTVILLE ITEM (Oct. 3, 2007), http://www.itemonline.com/news/local_news/informal-talks-opened-door-to-lethal-injection/.

³⁹ Brief for the Fordham Univ. School of Law, Louis Stein Center for Law and Ethics as Amicus Curiae in Support of Petitioners at 24, *Baze v. Rees*, 553 U.S. 35 (2007) (No. 07-5439).

The three drugs were originally sodium thiopental, pancurium bromide, and potassium chloride.

While it was not a problem in 1977, obtaining lethal injection drugs has become the biggest hindrance to executions in the United States. The first problem arose when the U.S. manufacturer of sodium thiopental, Hospira Inc., halted its production of the drug in January 2011. Hospira was the only Food and Drug Administration (“FDA”) approved manufacturer of sodium thiopental in the United States.⁴⁰ Due to a broad global campaign against the death penalty, Hospira was pressured to stop producing the drug.⁴¹ After problems in manufacturing at their plant in North Carolina, Hospira tried to shift production to Italy; however, Italy’s constitution prohibits the death penalty, so Hospira executives could have been held liable for the production of the drug.⁴² This led to delays and shortages of the drug, which prompted states to look for alternatives from manufacturers overseas. In 2011, the European Union put an export ban on standard lethal injection drugs that continued to limit the supply.⁴³

As sources of drugs began to disappear, states became more desperate to get them. In 2011, the Arkansas Department of Corrections purchased sodium thiopental from British distributors, and subsequently shared it with the states of Mississippi, Tennessee, and Oklahoma.⁴⁴ The states were forced to turn over the drugs to the Drug Enforcement Agency (“DEA”) for violating federal trade regulations. The DEA seized Georgia’s supply of sodium thiopental in 2011 after finding records suggesting that state officials broke the law and bought drugs from Dream Pharma – a single distributor operating out of the back of a driving school.⁴⁵ States also attempted to use pentobarbital, a similar fast-acting barbiturate, in lethal injections. Denmark’s Lundbeck is the only manufacturer in the U.S.

⁴⁰ Nathan Koppel, *Drug Halt Hinders Executions in the U.S.*, WALL. ST. J., <http://www.wsj.com/articles/SB10001424052748704754304576095980790129692> (last updated Jan. 22, 2011).

⁴¹ *Id.*

⁴² *Id.*

⁴³ Matt Ford, *Can Europe End the Death Penalty in America?*, ATLANTIC (Feb. 18, 2014), <http://www.theatlantic.com/international/archive/2014/02/can-europe-end-the-death-penalty-in-america/283790/>.

⁴⁴ *Id.*

⁴⁵ *Id.*

approved to make the drug, however, after pressure by European anti-death penalty groups, the company announced that it would stop producing pentobarbital.⁴⁶

The European Union's bans have made it almost impossible to legally obtain lethal injection drugs. Further, the FDA acts as a barrier to lethal injections because it regulates the manufacture, import, and sale of pharmaceuticals in the U.S.⁴⁷ The FDA prohibits importing misbranded or unapproved drugs into the U.S, which is usually how new anesthetics used for lethal injection are classified.⁴⁸ The problem is not that the drugs do not exist, but the only manufacturers of FDA approved versions, either here or in Europe, will not sell them to the states. Therefore, states must explore alternative avenues to find drugs to carry out lethal injections.

B. COMPOUNDING PHARMACIES

Because states cannot find pharmaceuticals already approved by the FDA, they have turned to willing compounding pharmacies and individual pharmacists to obtain drugs. "Compounding pharmacies do not face the same" FDA approval process as do larger drug companies, and this has led "to concerns about the safety and efficacy of their products in lethal injections."⁴⁹ Various state Departments of Corrections have been in contact with compounding pharmacies to make drugs like pentobarbital. However, in 2015 the American Pharmacists Association and the International Academy of Compounding Pharmacists announced their policy not to participate in executions, and they have encouraged their members to follow this policy.⁵⁰

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Nicholas Meyers, *Cook v. FDA and the Importation and Release of Lethal Injection Drugs*, J.L. & BIOSCIENCES (2014) (available at <http://jlb.oxfordjournals.org/content/early/2014/05/02/jlb.lsu006.full.pdf+html>).

⁴⁹ *Compounding Pharmacies*, DEATH PENALTY INFORMATION CENTER, <http://deathpenaltyinfo.org/compounding-pharmacies> (last visited Dec. 10, 2015).

⁵⁰ Tracy Connor, *Pharmacy Groups Balk at Supplying Lethal Injection Drugs*, NBC NEWS (Mar. 30, 2015) <http://www.nbcnews.com/news/us-news/pharmacy-groups-balk-supplying-lethal-injection-drugs-n332656>.

The compounding of lethal injection drugs leaves open a door for the constitutional argument that lethal injection is cruel and unusual. Because the drugs are not FDA approved, there is no guarantee how the drugs will actually work in an execution. If a drug has not been sufficiently tested, and its effects are unknown, there is a risk that the drug could create a substantial likelihood of pain. Compounded drugs can be mixed improperly, creating precipitates, or contain toxins that would create serious pain in an execution. As it gets harder to obtain lethal injection drugs, death-row inmates have more avenues available to argue that lethal injection is cruel and unusual.

IV. PHYSICAL EFFECTS OF CURRENT LETHAL INJECTION DRUGS

A. EFFECTS OF ONE AND THREE-DRUG PROTOCOLS

Because there is a constitutional right protecting citizens from cruel and unusual punishment, capital punishment has had to keep up with evolving standards of decency. It is evident that state legislatures hoped lethal injection would create a new era of capital punishment, where death was quick and completely painless. However, this is not necessarily the case. Inmates subjected to states' lethal injection protocols have, on occasion, experienced torturous, lingering deaths, like Clayton Lockett.

The three-drug protocol follows a general procedure. First, the inmate is strapped to a gurney, and a non-lethal saline solution is introduced through an IV.⁵¹ The first drug, sodium thiopental, is administered as a "fast-acting barbiturate," a sedative that makes the inmate lose consciousness in about twenty seconds.⁵² The second drug is pancuronium bromide, a muscle relaxant that stops the diaphragm, essentially shutting down the respiratory system.⁵³ Last, the executioner will inject potassium chloride, which induces cardiac arrest and will stop the heartbeat permanently.⁵⁴ The problem is that

⁵¹ Deborah Denno, *Getting to Death: Are Executions Constitutional?* 82 IOWA L. REV. 319, 379 (1997).

⁵² *Id.* at 379-80.

⁵³ *Id.*

⁵⁴ *Id.*

an insufficient dose of sodium thiopental can result in an inmate regaining consciousness and experiencing the pain of the second two drugs. No one denies that if the sodium thiopental is not administered correctly, or is not a high enough dosage, the pain from the second two drugs will be excruciating, thereby violating the Eighth Amendment.⁵⁵

The newer one-drug protocol aims to give one lethal dose of a fast acting barbiturate, instead of three drugs. Drugs such as pentobarbital, “do not act directly to stop the heart . . . but rather, create a state known as hypoxia that, in turn, will eventually cause cessation of rhythmic electrical activity to the heart, i.e., death.”⁵⁶ When a lethal injection is carried out with one drug, the inmate will suffocate to death after they have lost consciousness from a large dose of a sedative. For example, according to Tennessee’s one-drug lethal injection protocol, an inmate will be injected with two syringes of pentobarbital totaling a five-gram dose of the drug.⁵⁷ In *West*, the Petitioner’s expert witness testified that five grams of pentobarbital would likely cause death, and every time a five-gram dose of pentobarbital has been used in executions, the dose caused death.⁵⁸ The doctor further explained that five grams is ten to fifty times the amount of a therapeutic dose and *if properly administered* it will cause minimal pain with quick loss of consciousness.⁵⁹

B. PROBLEMS WITH THE PROTOCOLS

Although lethal injection protocols are minimally painful, relatively quick, and constitutional if *properly administered*, many death-row inmates would argue that there is a great risk that the drugs will not be administered properly. In a three-drug protocol, there is always a chance that the drugs will be administered in the wrong order, causing needless pain. In both types of protocols, correctly identifying a useable vein and inserting an IV line are of the utmost importance. The untrained employees who are tasked with being on the execution squad have a much higher chance of improperly

⁵⁵ *Baze*, 553 U.S. at 53.

⁵⁶ Intervening Plaintiff’s Amended Complaint at 19, *West v. Schofield* (No. 13-1627-I) (Aug. 22, 2014).

⁵⁷ *Id.* at 23.

⁵⁸ *Id.* at 31.

⁵⁹ *Id.* (emphasis added).

administering an IV than a medically trained professional would.⁶⁰ The chance of failure rises if it is impossible to find a suitable vein in the arm. In some cases, the execution team must insert IVs into different parts of the body, like a hand or groin, or even do a “cut-down” procedure where they expose the vein.⁶¹ According to a study done by law professor Austin Sarat, lethal injection has the highest rate (7.1%) of complications as compared to only 3.1% for all botched executions done between 1900 and 2010.⁶² He attributes this to faulty protocols, guidelines that do not allow for age, weight, physical condition of the person receiving the drugs, and the use of compounded drugs.⁶³

To use a specific example, death-row inmates in Tennessee brought suit finding many issues with the specific execution protocol. They contended that the protocol created a substantial risk of lingering and painful death when carried out “exactly as the protocol states.”⁶⁴ There are various reasons for their contention but one is that the protocols fail to provide adequate qualifications for those involved in an execution by lethal injection. Further, the Petitioners argued that medically trained personnel must be involved in a lethal injection.⁶⁵ Untrained personnel may not adequately set the IV lines, but the protocol forbids trained persons to supervise the IV from the bedside. Instead, they must watch remotely. If the IV is inserted improperly, the Petitioners believed, that there is a substantial risk of serious pain when the drug infiltrates the muscle instead of the vein.⁶⁶ Another argument the Petitioners brought was that compounded pentobarbital would be supplied by an unknown source because of the difficulty of compounding.⁶⁷ This is just one lawsuit for one state’s current protocols. As long as states are using these protocols with roots in Oklahoma’s unresearched initial procedure, death-row inmates will continue to bring method-of-execution claims against states.

⁶⁰ Denno, *supra* note 50, at 381.

⁶¹ *Id.* at 382.

⁶² AUSTIN SARAT, GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA’S DEATH PENALTY (Stan. Univ. Press 2014).

⁶³ *Id.*

⁶⁴ Transcript of Proceedings on 08/26/2015 at 8, *West v. Schofield* (No. 13-1627-I).

⁶⁵ *Id.*

⁶⁶ *Id.* at 10.

⁶⁷ *Id.* at 11.

C. THE ISSUE OF DEPARTMENT OF CORRECTIONS ADMINISTERING
DRUGS

One valid argument against lethal injection is that execution procedures are being done by medically untrained laypersons. This can mean that an untrained person will be starting an IV line, or declaring an inmate dead. Also, non-medical personnel are administering drugs, and, even more dangerous compounded drugs. Most protocols specify that doctors are only permitted to pronounce death, or they are very vague on what role a doctor will play in an execution.⁶⁸ The American Medical Association (“AMA”) has publicly condemned physician participating in executions.⁶⁹ This means that untrained prison wardens or employees of a state’s department of corrections are deciding on doses lethal injection drugs, procuring the drugs, and then administering the drugs. For now, states are resorting to compounding pharmacies to obtain drugs.

Compounded drugs are usually from local, licensed pharmacists who combine, mix, or alter drugs to the needs of a specific patient pursuant to a prescription.⁷⁰ The FDA does not regulate these compounding pharmacies, but state pharmacy boards have some oversight.⁷¹ There have been many instances of well-documented risks presented by compounded drugs.⁷² For example, in 2012 a breakout of fungal meningitis was traced back to a compounding pharmacy in Massachusetts.⁷³ Not only are these drugs possibly contaminated or less effective, but the doses for all prisoners is the same. In reality, factors like age, sex, and body weight can all contribute to an individual’s response to a drug.⁷⁴ Instead of having a trained anesthesiologist administer a sufficient dose, prison personnel give a baseline dose to everyone. It is assumed that because the doses are so high, they will work on everyone. However, this has not been the case, as evidenced by numerous botched executions.⁷⁵ It is a valid

⁶⁸ Denno, *supra* note 50, at 385.

⁶⁹ *Id.*

⁷⁰ Nathaniel Crider, *What You Don’t Know Will Kill You: A First Amendment Challenge to Lethal Injection Secrecy*, 48 COLUM. J.L. & SOC. PROBS. 1,14 (2014).

⁷¹ *Id.* at 15.

⁷² *Id.* at 18.

⁷³ *Id.*

⁷⁴ Denno, *supra* note 50, at 381.

⁷⁵ *Id.*

concern that non-medical personnel are administering non-FDA approved drugs in lethal injections, mainly because there is an argument that this will cause a “substantial risk of severe pain.”⁷⁶

V. LIABILITY FOR DOCTORS PARTICIPATING IN LETHAL INJECTION

The AMA’s code of ethics states: “A physician, as a member of a profession dedicated to preserving life when there is hope of doing so, should not be a participant in a legally authorized execution.”⁷⁷ Technically, lethal injection is not a medical procedure, but a quasi-medical way of executing inmates. In her article *The Lethal Injection Quandary*, Deborah Denno expressed the idea that medicine is the answer to solve lethal injection problems.⁷⁸ Although medical personnel – those most likely to know whether a lethal injection is done “right” – should be included, they usually avoid the procedure.⁷⁹ This is because medical professionals are concerned with different issues than legislators. Doctors are concerned with human well-being while legislators are concerned with retribution and deterrence.⁸⁰ The problem is that without medical professionals, lethal injections have a much higher risk of involving substantial pain.

A. DOCTORS PARTICIPATING IN THE ACTUAL EXECUTION

The secrecy of states’ lethal injection protocols comes into play when discussing doctors’ roles in the actual execution procedure. Despite medical ethics, twenty-eight states’ lethal injection protocols require a licensed physician to announce death.⁸¹ Thirty-five states explicitly allow physician participation in

⁷⁶ Intervening Plaintiff’s Amended Complaint at 55, *West v. Schofield* (No. 13-1627-I) (Aug. 22, 2014).

⁷⁷ American Medical Association, CODE OF MEDICAL ETHICS, Opinion 2.06 (1992).

⁷⁸ Denno, *supra* note 33, at 59.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *So Long as They Die, Lethal Injections in the United States*, HUMAN RIGHTS WATCH (Apr. 2006), https://www.hrw.org/reports/2006/us0406/6.htm#_ftnref176.

executions, and seventeen states require it.⁸² Some states require that the doctor monitor a heart rate machine.⁸³ Even with this small amount of participation doctors are violating the Code of Medical Ethics. Under AMA rules, doctor participation includes “monitoring vital signs, attending or observing as a physician, rendering technical advice regarding executions, selecting injection sites, starting intravenous lines; prescribing, preparing, administering or supervising the injection of drugs; inspecting or testing lethal injection devices; and consulting with or supervising lethal injection personnel.”⁸⁴ One doctor has said of lethal injection, “If the doctors and nurses are removed, I don't think [lethal injections] could be competently or predictably done.”⁸⁵

Because doctor participation is such a contentious topic, states have passed secrecy laws to protect them. Ten states have already passed laws shrouding their execution protocols in secrecy.⁸⁶ This means that information like the source of the lethal injection drugs, identity of the compounder, and qualifications of the pharmacist or doctor who prescribes the drugs are state secrets.⁸⁷ Lawmakers explicitly justify these laws as protecting medical participants from professional censure, and from threats and harassment by death penalty abolitionists.⁸⁸

Critics of secrecy laws argue that hiding information poses constitutional concerns regarding the administration of the death penalty. Practically, if all the protocols are a secret, it makes it difficult for an inmate to make a case after *Baze*.⁸⁹ Also, it may violate prisoners' First Amendment rights of access to information to shield them from knowing how they will die.⁹⁰ Secrecy regarding lethal injection reduces predictability and accountability in the administration of executions. Finally, shielding states from providing information can lead to shady, underground practices like buying

⁸² Atul Gawande, *When Law and Ethics Collide—Why Physicians Participate in Executions*, 354 NEW ENG. J. MED. 1221, 1221-29 (Mar. 23, 2006).

⁸³ Denno, *supra* note 33, at 81.

⁸⁴ *So Long as They Die*, *supra* note 80.

⁸⁵ Gawande, *supra* note 81.

⁸⁶ Crider, *supra* note 69, at 21.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

drugs from unlicensed pharmacies or tricking hospitals into selling drugs.⁹¹ All of these concerns factor into a lethal injection protocol having a risk of substantial pain.

B. DOCTORS PRESCRIBING LETHAL DOSES OF DRUGS

“Prescribing, preparing, administering or supervising the injection of drugs” is against the rules of ethics for doctors.⁹² Therefore, it is a valid question to ask how state prisons are getting prescriptions for lethal doses of drugs. Not only is it against medical ethics for doctors to prescribe the drugs, but it may be against federal law. Previously, large drug companies would sell lethal injection drugs to state departments of justice. Now states get their drugs from compounding pharmacies, but DEA regulations maintain that a drug cannot be made without a prescription from a physician.⁹³ According to federal law, compounding pharmacies may only make drugs for an ultimate user, and the patient or a family member must pick up the prescription from the pharmacy.⁹⁴ For obvious reasons, this is not what happens in lethal execution procedures. According to DEA regulations and the Controlled Substances Act, a doctor will have to write the prescription for a medical purpose in his usual course of medical practice⁹⁵. Clearly this raises an Eighth Amendment issue. If lethal injection drugs are being obtained illegally, then the method of execution could be determined to be cruel and unusual. Inmates could make a case that states negligence in getting illegal drugs or insufficient testing of the drugs could result in cruel and unusual punishment. Although it may be a somewhat far reaching argument, it has not been decided by the Supreme Court and is still valid..

⁹¹ *Id.* at 27.

⁹² American Medical Association, CODE OF MEDICAL ETHICS, Opinion 2.06 (1992).

⁹³ Ben Richmond, *Oklahoma May not be Capable of a Legal Execution*, MOTHERBOARD (Oct. 23, 2014 6:00 AM EST), <http://motherboard.vice.com/read/oklahoma-may-not-be-capable-of-a-legal-execution>.

⁹⁴ *Id.*

⁹⁵ *Id.*

VI. SOLUTIONS TO DEALING WITH LETHAL INJECTION PROTOCOLS

A. TRANSPARENCY

Lethal injection seems to be the execution method of choice for the foreseeable future. It has been held constitutional twice in the last eight years, and no guarantees have been given for a “completely painless death.”⁹⁶ However, that does not mean that the process should not be reformed to meet constitutional requirements against cruel and unusual punishment. In order to have a death penalty, there must be a method that conforms to the evolving standards of decency. Lethal injection *could* meet that standard, but I am not convinced that it is currently doing so. To have a baseline constitutional protocol for lethal injection, the states must understand the problems and gather accurate information to sufficiently carry out lethal injections.

At this time, legislators, governors, departments of corrections, and prison officials are the authors of lethal injection protocols. Instead of having non-medical persons invent a medical procedure, there should be some trained medical input into the procedures. This would require states to make their protocols and procedures available for public information purposes. This should not be a problem because the First Amendment should allow the publication of this type of information. The First Amendment does not guarantee a general right to governmental information.⁹⁷ On the other hand, death is different. The states’ power to execute its people is one of the most controversial powers that it holds, and therefore transparency is of the utmost importance.⁹⁸ The Eighth Amendment bans cruel and unusual punishment, which is determined by evolving standards of decency. Evolving standards of decency can only be measured if society has access to reliable information about what is actually happening in executions. The relationship between the First

⁹⁶ See generally *Baze*, 553 U.S. at 35; *Glossip*, 135 S. Ct. at 2726.

⁹⁷ See *Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1978) (Stewart, J., concurring) (“The First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government, nor do they guarantee the press any basic right of access superior to that of the public generally. The Constitution does no more than assure the public and the press equal access once government has opened its doors.”).

⁹⁸ Crider, *supra* note 69, at 36.

and Eighth Amendments guarantees that execution procedure information should be available to the public.

After the records of the implementation of lethal injections are available, it would make sense to review all the procedures and do an in-depth analysis of the procedures. Instead of rushing review periods, Tennessee had a ninety-day review window.⁹⁹ States should take the time to conduct a realistic and helpful analysis of where problems occur. At the point where there is a baseline of knowledge about lethal injections, doctors and other medical professionals could comment and make suggestions for a more humane lethal injection protocol. This cannot happen currently because of the medical associations' aversions at having anything to do with lethal injections. Not all doctors are members of these medical associations, however, and it is evident that there are always going to be doctors willing to participate in executions. A medical association's participation in the evaluation of lethal injection could make their abolishing arguments even stronger. At the point that some doctors completely engage in the process, and give comment to lethal injection procedures, it could be assumed that lethal injection would be as safe a method of execution as possible. The risk of pain would be negligible. Then doctors and medical associations opposing lethal injection would have a stronger argument, that even though it is a medically sound procedure, it is against the ethics for which they stand. Instead of hindering the process, medical associations could help alleviate concerns and suggest the most painless method possible.¹⁰⁰

B. CAPITALISM TO PROVIDE LETHAL INJECTION DRUGS

After a full analysis of lethal injection procedures and medical recommendation on the drugs to be used, states will still be struggling with how to obtain lethal injection drugs. Although it is constitutional to execute people, many of the largest drug manufacturers either morally do not support the death penalty, or feel pressure from activist groups to not support the death penalty. First of all, concerns may be dispelled after there has been adequate comment time from medical professionals. If companies and activists were assured that the current method of execution was completely humane, there may be fewer concerns when they make the decision to sell

⁹⁹ Denno, *supra* note 33, at 114.

¹⁰⁰ *Id.*

drugs used for lethal injection. Second, it is important to use FDA approved drugs for lethal injections. This will dispel any arguments against compounding pharmacies, which raise constitutional questions anyways. Big pharmaceutical companies take doctors out of the prescription phase of an execution, since they could sell directly to the states. The main issue is that there is no American company licensed to make drugs that would be the most effective in a lethal injection.

In the United States, economic forces can dictate society. If there is enough demand, then the market will create a supply. Clearly there is not enough demand, or there are restrictions on the free market economy. If states are willing to spend the money, then it follows that companies should be willing to manufacture and sell the drugs they need. Either states are going to have to spend more money, or companies are going to have to stand against protestors and supply drugs like sodium thiopental and pentobarbital. At this time, companies will not increase their value by selling drugs to execute people. That would have to change. Another option would be that another newer, better drug option is introduced – a drug option that would be FDA regulated and still manufactured in the United States.

Capitalism is also the answer to doctors' participation in lethal injections. I have argued that lethal injections would go much more smoothly if doctors were able to perform the entire process. That is not possible now, but if states changed their protocols to utilize a full medical setting, there is little doubt that doctors would still be willing to participate. Similar to the argument for acquiring drugs, if states were willing to pay doctors to perform lethal injections, undoubtedly there would be plenty of physicians willing to take on that task. The death penalty process would be safer if doctors participated. States would get what they want – retribution and deterrence – and doctors would receive a benefit as well.

C. DISCONTINUE LETHAL INJECTION

One final solution to deal with lethal injection would be to get rid of it altogether. This seems an unlikely outcome because states will not be able to prove that there is no circumstance in which an inmate would not feel pain. Because of the nature of the punishment, there is just no way to gather data to prove that all those executed

either felt pain, or felt nothing. The likelihood of a lethal injection challenge case ever winning under a *Baze* standard is not high. There is established precedent that lethal injection is constitutional as a method of execution. Instead, it has been argued that because the death penalty is so seldom used, it has become “unusual” in the sense that it is infrequent. I believe that this is the only argument that could one day succeed in the Supreme Court. Otherwise, getting rid of lethal injection would just put states in a predicament to find a newer, better form of execution.

VII. CONCLUSION

While lethal injection has been ruled constitutional for now, there is always the chance that a new method-of-execution case will meet the *Baze* test, and rule out lethal injection forever. If our society as a whole still wants to retain the death penalty, then there must be some valid method of carrying it out. For now, there are issues with where lethal injection drugs are coming from, how they react in the body, and who is prescribing them. This does not have to be the case. If states were willing to engage in a transparent discussion and create the most humane lethal injection protocols, it would go a long way in making sure lethal injection meets the standards of decency. States could also do a better job at procuring the best legal drugs possible. Finally, if states and doctors could agree that doctors could have some role in lethal injections, the process would be safer and constitutional. There are issues with lethal injection, but for now it is the best method we have.